No. 90-1124

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KEITH JACOBSON,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF

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ARGUMENT

The Solicitor General assumes the government's frustrating tactic of misrepresenting petitioner's contentions.

It is no wonder that the Government wishes to put the petitioner in the position of arguing outrageous government conduct. "The defense that the government's conduct was so outrageous as to require reversal on due process grounds is often raised but is almost never successful." *United States v. Gamble*, 737 F.2d 853, 859 (C.A.10, 1984).

The petitioner recognizes that, "in a sense, entrapment and the due process defense are on a continuum because both are based on the principle that court's must be closed to the trial of a crime instigated by the government's own agents." *Gamble*, 737 F.2d 857 quoting *Sor-*

rells v. United States, 287 U.S. 435, 459, 53 S.Ct. 210, 219, 77 L.Ed. 413, 426 (1932) (Roberts, J., concurring). Both defenses are implicated when the evidence shows that the defendant was lawfully "minding his own business" when the Government involvement begins. *Gamble*, 737 F.2d 858.

However, entrapment focuses on predisposition. "Predisposition is, by definition, the defendant's state of mind and inclinations before his *initial exposure to government agents*." *United States v. Janotti*, 501 F.Supp. 1182, 1191 (E.D. PA., 1980); *United States v. Kaminski*, 703 F.2d 1004, 1008 (C.A. 7, 1983); *United States v. Dawson*, 467 F.2d 688 (C.A. 8, 1978); *United States v. Hunt*, 749 F.2d 1078 (C.A. 4, 1978).

Entrapment requires an analysis of the following:

1. the character or reputation of the defendant;
2. whether the suggestion of criminal activity was originally made by the Government;
3. whether the defendant was engaged in criminal activity for a profit;
4. whether the defendant evidenced reluctance to commit the offense, overcome by Government persuasion;
5. the nature of the inducement or persuasion offered by the Government.

See *United States v. Thoma*, 726 F.2d 1191, 1197 (1984).

Clearly, "the state of mind of a defendant *before* government agents make any suggestion that he shall commit a crime," *United States v. Williams*, 705 F.2d 603 (C.A. 2, 1983); *United States v. Dion*, 762 F.2d 674 (C.A. 8, 1985) has always been considered by the courts of appeal to be of critical importance. In this case, Jacobson's reputation in his community was excellent, the Government suggested the criminal activity; Jacobson had never engaged in criminal activity in any way, let alone for

profit; he was given repeated opportunities to violate the law which he resisted and was induced to violate the law only after the law had been amended to make the receipt of child pornography an offense and the Government had fraudulently assured him that preoccupation with the importation of child pornography was "hysterical nonsense" and that "American Solicitors" had assured the government's front organization that if the material was mailed it could not be seized and opened.

The Eighth Circuit panel did not hold that the Government was guilty of outrageous conduct. It held that petitioner was entrapped as a matter of law because the Government failed to prove that the petitioner had committed a crime or was engaged in criminal activity before employing its undercover artifice and stratagem against him. Jacobson was like Woo Wai; like Butts; like Sorrells; like Sherman; he "had never committed any such offense as the officer of the Government arrested and prosecuted him for prior to the time when they induced him to do the acts disclosed by (the) testimony." *Butts v. United States*, 279 Fed. 38, 18 A.L.R. 143, 145 (C.A. 8, 1921).

Judge Heaney borrowed from regulations of the attorney general[1] to respond to the government's contention that a reversal in *Jacobson* would hamstring Government undercover investigations. Judge Heaney's point was that the Government could hardly be handicapped by a

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[1] 28 C.F.R. § 23.20(a) (1990) provides:

> Criminal intelligence, information concerning an individual shall be collected and maintained only if it is reasonably suspected that the individual is involved in criminal activity and that information is relevant to that criminal activity.

§ 23.1 of that title provides that the purpose of the regulation is to assure that criminal intelligence systems operating under the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701, *et seq.*, are operated in conformance with the privacy and constitutional rights of individuals.

requirement that it just follow its own rules. The underpinning precedents for his discussion were cases which had been authority in the Eighth Circiut since 1921, fifty-five years before *Hampton v. United States*, 425 U.S. 484, 48 L.Ed.2d 113, 96 S.Ct. 1646 (1976) generated the "outrageous government conduct" defense.

Judge Fagg's en banc opinion says defendant is really arguing Fifth Amendment principles. Petitioner does not say this. Judge Heaney does not say it. None of the Eighth Circuit cases preceding *Jacobson* say it. Thus, it is Judge Fagg who departs from established precedent and transforms the entrapment defense. The Eighth Circuit's en banc opinion holds that:

1. Once a jury has found a defendant predisposed, no matter on what sort of evidence nor how and when obtained, predisposition is a settled issue;
2. All Government undercover operations must be reviewed under due process principles;
3. Since due process limitations 'come into play only when the Government activity in question violates some protected right of the defendant' and there is 'no constitutional right to be free from investigation' due process is never violated and government undercover operations are beyond the court's power to review.

The assertion that, "there is no right to be free from investigation," is a line taken completely out of the context of *United States v. Trayer*, 898 Fed.2d 805 (D.C. Cir., 1990).

Trayer was a Fourth Amendment case. A drug sniffing Golden Retriever came to a point outside Trayer's roomette on an Amtrak train stopped in Washington's Union Station. An examination of the train's manifest disclosed that Trayer fit the profile of a drug courier. The circuit court held that there was not just reasonable suspicion to search the roomette but probable cause.

The *Trayer* opinion ascribes the quoted phrase to *United States v. Lloyd*, 886 F.2d 447 (D.C. Cir. 1989). However, the language does not appear in *Lloyd*. Lloyd also fit the drug courier profile. Lloyd contended that he was "seized" as the term is used in the Fourth Amendment. The Circuit Court found he was not and that a consensual search of Lloyd's luggage was valid because "Lloyd was not forcibly detained or physically abused."

Extrapolating the rule that everyone is always subject to a so called "investigation" from these cases in which there was good reason to investigate evades the rule that entrapment requires proof of predisposition *before* Government agents begin their interaction with the defendant and illustrates precisely just how dangerous the Eighth Circuti's opinion is. Far from justifying Judge Fagg's views, *Trayer* and *Lloyd* furnish further grounds for granting certiorari.

The Solicitor General also repeats the assertion that the petitioner did not raise the issue he now argues in the circuit court. Petitioner has always argued that the Government had adduced no evidence that petitioner had ever had any intention of violating the law, so therefore, the Government had failed to prove that petitioner was predisposed to commit the crime charged in the indictment. Petitioner relied on the numerous circuit court entrapment opinions focusing on the petitioner's state of mind *before* Government agents suggest the commission of a crime.

The government's response, then as now, was that the petitioner's interest in teenage sexuality, his admitted homosexuality and other selected responses to the postal inspectors' sexual attitude surveys established predisposition.

Petitioner's rejoinder, then and now, was that "private fantasies are not within the statute's (18 U.S.C. § 2252(a)(2)) ambit." *United States v. Wiegand*, 812 F.2d 1239 (C.A. 9, 1987). Petitioner urged that although

"artifice and stratagem may be employed to catch those engaged in criminal enterprises" *Sorrells v. United States*, *supra*, the Government had to prove a "previous intent to violate the law", *United States v. Dawson*, *supra*, before artifice and stratagem are justified. Just showing that petitioner had an interest in preteen sex is not proof that he would commit a crime to satisfy it any more than showing that someone who watches "Columbo," for instance, is proof that they will commit murder.

The Solicitor General concludes his resistance to the petition for certiorari by saying that it is the unanimous view of the other circuits that the Government need not have a reasonable suspicion of criminal activity before beginning an undercover investigation of a particular individual. The Solicitor General cites *United States v. Jenrette*, 744 F.2d 817 (D.C. Cir., 1984); *United States v. Janotti*, 673 F.2d 578 (C.A. 3, 1982); *United States v. Myers*, 635 F.2d 932 (C.A. 2, 1982).

These ABSCAM cases are clearly different from *Jacobson*. The Attorney General's guidelines on F.B.I. undercover operations identify two distinct types of undercover operation:

> a. (where) there is a reasonable indication, based on information developed through informants or other means, that the subject in engaging, has engaged or is likely to engage in illegal activity.
>
> b. The opportunity for illegal activity has been structured so that there is reason for believing that persons brought to it are predisposed to engage in the contemplated illegal activity.

ABSCAM falls in the second classification of undercover activities. The Government, posing as an Arab Sheik named Abdul, offered a commodity, money, in exchange for favorable planning commission and city council votes on a construction project in downtown Philadelphia and favorable Congressional votes on a private immigration bill.

The Government prosecuted those who "rose to the bait."

Jacobson falls in the first classification of undercover activities. Jacobson was targeted. The Government set out to find some "trickery, persuasion or fraud" (*Sorrels*, 77 L.Ed. 423) which would incite Jacobson's homosexuality into criminal activity. Since a violation of the child pornography statute apparently does not require a specific intent, it was not even necessary for Jacobson to know that he was committing a crime.[2]

The Solicitor General also cites *United States v. Driscoll*, 852 F.2d 84 (C.A. 3, 1988); *United States v. Gamble*, *supra*; *United States v. Thoma*, *supra*, and *United States v. Luttrell*, No. 87-5303 (C.A. 9, January 23, 1991).

The defendant did not raise entrapment in either *Driscoll* or *Gamble*. Unless Judge Fagg is correct and the outrageous government conduct defense is the defendant's only approach, these cases do not belong in the Solicitor General's strip cite. In *Thoma*, the defendant had once been convicted of mailing child pornography, confessed that he had only "gotten involved again (because) money was tight" and possessed sophisticated equipment for producing child pornography. The Seventh

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[2] Petitioner argued at trial that 18 U.S.C. § 2252(a) was unconstitutional because it imposed a severe and stigmatizing penalty, ten years imprisonment and $100,000.00 fine, was an offense derived from the common law crime of open and notorious lewdness, Part II, Vol. III, A.L.I. Model Penal Code, § 251.1, p. 448 (1980) and appears in Title 18 of the federal criminal code with other specific intent statutes, 18 U.S.C. § 2241, § 1735, § 1737. *Morisette v. United States*, 342 U.S. 246, 96 L.Ed. 288, 72 S.Ct. 240 (1952); *United States v. United Gypsum Company*, 438 U.S. 422, 57 L.Ed.2d 854, 98 S.Ct. 2864 (1978). Petitioner offered instructions which included the element of specific intent (CR 71, 72) and objected to the instruction given by the trial court (T301). The issue was rasied in petitioner's brief in Eighth Circuit but the court's en banc opinion does not discuss it.

Circuit held that defendant was not entraped as a matter of law. *Luttrell* is not even an opinion. It is an order vacating a prior panel opinion. It relies solely on *Jenrette, Janotti, Myers* and *Gamble.*

In *Sherman v. United States*, 356 U.S. 369, 2 L.Ed.2d 848, 78 S.Ct. 819 (1958), the court held that there was such a thing as entrapment as a matter of law. In *Sorrells v. United States, supra*, the court said that entrapment was not a constitutional defense. Both of these cases involved undercover operations.

The Eighth Circuit has now held that entrapment *is* a constitutional defense, that Government undercover operations are always reviewed on Fifth Amendment principles, that predisposition, once settled by a jury adversely to the defendant in the trial court, is not subject to review in the circuit court, that the defendant's sole avenue of attack is along Fifth Amendment lines which necessarily fail because there is "no constitutional right to be free from investigation."

That chilling catch phrase neatly answers every argument that defendant makes. No right to be left alone. No right to privacy—none at all! The Government can intrude where and in what manner it pleases as long as its methods are covert rather than overt because the Government always has the right to investigate.

Characterizing what the Government did to Jacobson as "investigation" is perhaps the cruelest euphemism of all. The facts do not disclose an "investigation". They disclose a campaign conducted over the course of years to find the right button which Government agents could push to induce the defendant to commit a crime. It was playing "on the weaknesses of an innocent party" in order to beguile "him into committing crimes which he otherwise would not have attempted." *Sherman, supra.*

CONCLUSION

There has always been a distinction between entrapment and outrageous government conduct. Indeed, entrapment as a matter of law existed in virtually all the states and courts of appeal eleven years before *Sorrells* v. *United States*, Ann. 18 A.L.R. 146. State courts had almost unanimously responded to crimes instigated by the Government that it was not the purpose of the Government to solicit crime, but to ascertain if the defendant was engaged in unlawful business. Various legal theories were advanced to underpin the defense but none of them were based on due process.

Petitioner's argument is not what the Government says it is. Petitioner's argument is that he was neither engaging in nor contemplating criminal activity; that the criminal design originated with the Government which implanted in the mind of an innocent person the disposition to commit the alleged offense.

This is standard entrapment material. The Government agenda for making convictions ever easier to obtain and retain wants to call this "outrageous government conduct."

A sheep is not a sheep if it is a goat.

The Eighth Circuit has gone further than the Supreme Court and created a new and disagreeable proposition. Certiorari should be granted.

If there is no entrapment as a matter of law any more, the Supreme Court should say it. If entrapment must be considered under Fifth Amendment principles, the Supreme Court should say it. If anyone can be made a target of an undercover Government campaign to induce them to commit a crime no matter how innocent

their activities nor how they are selected as targets, then the Supreme Court should say it.

Respectfully submitted,

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